

FINAL
SAFETY AND HEALTH CODES BOARD
MEETING MINUTES
TUESDAY, SEPTEMBER 15, 2005

A regular meeting of the Safety and Health Codes Board was called to order at 10:00 a.m.

BOARD MEMBERS PRESENT: Mr. Roger Burkhart, Outgoing Secretary/Newly-Elected Vice Chair
Ms. Anna Jolly, Outgoing Chair
Mr. Alvin Keels, Sr.
Dr. James H. Mundy
Mr. Linwood Saunders
Mr. Chuck Stiff
Mr. Daniel A. Sutton
Dr. Khizar Wasti

BOARD MEMBERS ABSENT: Mr. Louis Cernak, Newly Elected Chairman
Ms. Juanita Garcia, Outgoing Vice Chair
Mr. James J. Golden
Mr. Satish Korpe
Mr. Kenneth Rigmaiden
Ms. Milagro Rodriguez

STAFF PRESENT: Mr. Ray Davenport, Labor and Industry Commissioner
Mr. Bill Burge, Assistant Commissioner - Programs
Mr. Fred Barton, Director/Chief Inspector –Boiler Safety Compliance
Mr. Ronald Graham, Health Compliance Director
Mr. Jay Withrow, Office of Legal Support Director
Mr. John Crisanti, Office of Planning and Evaluation Manager
Ms. Reba O'Connor, Regulatory Coordinator
Ms. Jennifer Wester, Director, Cooperative Programs
Ms. Regina Cobb, Agency Management Analyst Sr.

OTHERS PRESENT: Mr. Tom Pope, Federal OSHA
Ms. Anne Burkhart
Mr. Cotton Sizemore, Building Trades

ORDERING OF AGENDA

After calling the meeting to order at 10:00 a.m., Chairperson Anna Jolly asked for a motion from the Board to accept the proposed Agenda. Mr. Linwood Saunders made the motion to accept the Agenda, as submitted, and Mr. Alvin Keels seconded the motion. The motion was carried by voice vote.

APPROVAL OF MINUTES

Chairperson Jolly asked for a motion from the Board to approve the Minutes of the May 24, 2005 meeting. Dr. Mundy made the motion to accept the Minutes, as submitted, and Mr. Daniel Sutton seconded the motion. The motion was carried by voice vote. There was no discussion.

ELECTION OF OFFICERS

Chairperson Jolly asked for nominations for the position of Chairman of the Board. Mr. Saunders nominated Mr. Louis Cernak, *in absentia*, and Dr. Mundy seconded the nomination. There were no other nominations. Mr. Cernak was elected unanimously. Next, Ms. Jolly asked for nominations for Vice Chairman. Mr. Saunders nominated Mr. Roger Burkhart who was elected by unanimous voice vote. Again, there were no other nominations. Ms. Jolly noted that according to the Bylaws, the Chairman selects the secretary. In Chairman Cernak's absence and with Mr. Burkhart's suggestion, Ms. Jolly then continued to preside over the meeting.

PUBLIC COMMENT

Ms. Jolly opened the floor to comments from the public on matters relevant to the Board, however, there were no comments.

OLD BUSINESS

Update on 16 VAC 25-55, Proposed Regulations Governing Financial Responsibility of Boiler and Pressure Vessel Contract Fee Inspectors

Mr. Fred Barton, Chief Boiler Inspector, explained that currently the regulation is in the proposed stage and summarized the actions completed up to this time. Mr. Barton informed the Board that the Department of Planning and Budget (DPB) approved the revised proposed draft on August 23, 2005, and currently the proposed draft is in the Office of the Secretary of Commerce and Trade for approval. He concluded by stating that the proposed draft regulation will next go to the Governor's Office for approval and, after the Governor's approval, a 60-day comment period will be scheduled within which a public hearing will be held by the Board at a date to be determined.

16 VAC 25-60, Administrative Regulations for the Virginia Occupational Safety and Health (VOSH) Program

On behalf of the Department of Labor and Industry, Mr. Jay Withrow, Director of Legal Support, requested the Board to consider for adoption as “proposed” standards of the Board the proposed Administrative Regulations. Mr. Withrow informed the Board that on December 14, 2004, the Board approved a Notice of Intended Regulatory Action (NOIRA), regarding the Administrative Regulations, which was published in *The Virginia Register*. He stated that no comments were received during the public comment period of August 8, 2005 to September 9, 2005.

Mr. Withrow provided background information on the proposed regulation, then detailed the numerous changes in the proposed regulation. He informed the Board that some of the changes, such as definitions, were housekeeping measures which do not involve any substantive changes, while other revisions were more significant. He noted that under §30, Applicability to Public Employers, the Department, based on its statutes, would subject public sector employers (and public sector employees) to the same potential criminal sanctions as private sector employers and employees.

He explained that the Department had recommended that public employers, both state and local government, be subject to potential penalties in willful cases where there was a willful violation issue; and that both the civil willful penalties and the criminal willful sanctions be applied to public employers, if an employer willfully violates a standard and such violation results in the death of an employee. He noted that the Department felt that there was statutory authority to provide for this.

He added that late afternoon on the day before the Board meeting, the Office of the Attorney General, which reviews the Department’s regulations and provides the Department with the required APA authority to act, contacted him with its decision not sign the letter, without further legal research, with regard to these two provisions in §30. He stated that, without the approval of the Attorney General’s Office on these two provisions, the Department could not proceed with the regulatory amendments to these two provisions.

Mr. Withrow assured the Board that the Department would be in further contact with the Attorney General’s Office to obtain written clarification on their position regarding these two provisions vis-à-vis the Board’s authority.

Mr. Withrow called attention to another criminal provision in which the Department wants to apply to the public sector – §40.1-10 of the *Code of Virginia*, which deals with offenses in regards to examinations, inspections, etc. He stated that under this section, the Commissioner has the authority under the *Code of Virginia* to get sworn testimony, send interrogatories to employers or individuals, and if a person refuses to do so, he can be subject to a criminal violation and criminal penalties. He added that if a person obstructs an investigation, he could also be subject to criminal penalties. Mr. Withrow noted that the Department has not had any prior instances of these actions occurring, but

added that there is no legal reason or policy reason not to apply this proposed amendment to public sector individuals. He stated that this proposed amendment would be an enforcement tool that would be available to the Department.

In responding to Mr. Sutton's question concerning expounding on the Attorney General's concerns with the now stricken sections of the proposed regulation, Mr. Withrow responded that the Attorney General's Office was of the opinion that under in common law a sovereign cannot sue itself. He added that §40.1-2.1 of the *Code of Virginia* allows any provision in Title 40.1 can be applied to public employers as long as it is done through regulation -- which is why the Department attempted this action.

Next, Mr. Withrow discussed item number 5 of the briefing package, which is the application of certain *Virginia Code* sections to local governments, i.e., §§40.1-49.9, concerning the issuance of warrants, 40.1-49.10, concerning the duration of warrants, 40.1-49.11, concerning conduct of inspection conduct of inspection testing collection samples for analysis, and 40.1-49.12, concerning review by courts of warrants issued. He explained that we do not currently have any method for compelling a local government to allow us to conduct an inspection. He stated that the adoption of this proposed amendment would be an additional enforcement tool and it would enhance the Department's ability to treat the public sector as it would the private sector.

Mr. Withrow noted that other changes include requiring employers to comply with the applicable manufacturer's specifications and limitations for the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment in Parts 1910, 1915, 1917, 1919, 1926 and 1928, rather than having to cite violations related to these issues under the general duty clause, §40.1-51.1.A of the *Code of Virginia*. He stated that some of the proposed amendments further clarify definitional changes. He explained other changes that codify VOSH policies, i.e., proposed amendment to §260, Issuance of Citation and Proposed Penalty, which among other things includes a clarification on how to calculate the time window available for issuing a citation, and the addition of the multi-employer worksite inspection policy and the defense to the policy in the new subsections F and G, respectively. Mr. Withrow explained that the multi-employer worksite policy is a fairly narrow, high profile policy that dates back to the 1970's. He added that, without this policy, there is the potential that VOSH could be found to be not "as effective as" Federal OSHA which is required under the state plan agreement with federal OSHA.

Mr. Withrow stated that no significant impact on employers is anticipated if the proposed regulation is adopted, as it merely codifies current and longstanding VOSH policies, interpretations and procedures or their reflective statutory changes. With respect to the impact on employees and on the Department, Mr. Withrow stated that no adverse impact is anticipated if the proposed standard is adopted.

With respect to Benefit/Cost of the proposed regulation, Mr. Withrow stated that no significant additional cost issues associated with the adoption of the regulation are anticipated since the proposed changes primarily reflect previously longstanding VOSH

enforcement policies, interpretations or procedures or reflect current statutory requirements which impact the program. Mr. Withrow added that for proposed amendments to §30, Applicability to Public Employers, the cost impact should be minimal since it is estimated that on average no more than one public employer has been issued willful violations per year over the last five year period. With respect to the proposed amendment to §150, Maritime Standards, Mr. Withrow stated that the amendment can potentially result in cost increases for public sector employers in the Longshoring and Gear certification industries; however, the cost impact should be minimal since the number of employees affected is estimated to not exceed a few hundred employees. Mr. Withrow also stated that the proposed amendments to §260, codifying the multi-employer citation policy and defense, can result in some cost increases for employers that fall into the category of the "controlling" employer also acting as a general contractor. The additional cost would be in the form of potential citations and penalties issued by the Department in the estimated one percent of cases that could be affected under the proposed amendment.

On behalf of the Department of Labor and Industry, Mr. Withrow recommended that the Safety and Health Codes Board consider for adoption the proposed regulation to amend 16 VAC 25-60, Administrative Regulations for the Virginia Occupational Safety and Health (VOSH) Program, as authorized by §40.1-22(5) of the *Code of Virginia*. He also recommended that the Board state in any motion it may make to amend this regulation that it will receive, consider and respond to petitions by any interested person at any time with respect to reconsideration or revision of this or any other regulation.

Since there were no additional questions asked. Dr. Mundy moved to adopt the proposed regulation to amend 16 VAC 25-60, Administrative Regulations for the Virginia Occupational Safety and Health (VOSH) Program. Mr. Burkhart seconded the motion which was carried by unanimous voice vote.

16 VAC 25-75, Proposed Regulation to Amend the General Industry Standard for Telecommunications, General, Approach Distances, §1910.268(b)(7)(i)

Mr. John Crisanti, Director, Planning and Evaluation, served as a substitute for Mr. Glenn Cox, Director of VOSH Programs, who had a prior commitment and was unable to attend this meeting. On behalf of the VOSH program, Mr. Crisanti requested the Board to consider for adoption as a proposed regulation of the Board VOSH's proposed amendments to the General Industry Standard for Telecommunications, General, Approach Distances, §1910.268(b)(7)(i), pursuant to §40.1-22(5) of the *Code of Virginia*.

Mr. Crisanti explained that the Telecommunications standard, §1910.268(b)(7)(i), specifies that the wearing of protective gloves will qualify as insulation for any live electrical part in the area where the employee is working. He stated that the existing standard requires no additional blanketing or other means of insulation for nearby high voltage wires which might be inadvertently touched by other body parts of the employee.

He continued by explaining that under the current standard, an employee can be exposed to uninsulated live electrical parts in this work area, but only actually be protected from touching them with his hands and possibly forearms through the use of gloves. In comparing the current Telecommunications standard to the Electric Power Generation, Transmission, and Distribution standard, §1910.269, Mr. Crisanti stated that §1910.269, specifies that the wearing of protective gloves and sleeves only qualifies as insulation for the live electrical part upon which the employee is actually working; and that all other nearby live or “hot” electrical parts and power lines in the work area are required to be insulated so an employee will less likely accidentally contact an energized part or power line with an uninsulated part of his body or other conductive object(s).

Mr. Crisanti informed the Board that the purpose of this proposed change is to amend the telecommunications standard to provide the same degree of protection to telecommunication employees working in similar proximity to power lines as their counterparts under the electrical power generation, transmission and distribution standard.

He added that employers should not experience any significant additional cost or implementation impact with the requested changes to the regulation; nor is it anticipated that the Department will experience a significant impact. He further added that telecommunications employees would benefit from increased protection while engaged in work near power lines.

On behalf of the staff of the Department of Labor and Industry, Mr. Crisanti recommended that the Board consider for adoption the proposed regulation to amend §1910.268(b)(7)(i), General Industry Standard for Telecommunications, General, Approach Distances, as authorized by §40.1-22(5) of the *Code of Virginia*.

There was no discussion. Dr. Mundy made the motion to adopt the proposed regulation to amend §1910.268(b)(7)(i), General Industry Standard for Telecommunications, General, Approach Distances. Mr. Chuck Stiff seconded the motion, which was carried by voice vote.

NEW BUSINESS

There was no new business.

Items of Interest from the Department

There were no items of interest from the Department at this time.

Items of Interest from the Board

There were no items of interest from the Board at this time.

Adjournment

There being no further business to come before the Board, Mr. Stiff moved to adjourn the meeting and Dr. Mundy seconded the motion, which was carried by voice vote. The meeting adjourned at 11:40 a.m.